

Malaysia Building Society Bhd v Song Ah Tu

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HIGH COURT (ALOR SETAR) — CIVIL SUIT NO 22-07 OF 2003
MOHD SOFIAN JC
30 APRIL 2007

B

Civil Procedure — Limitation of action — Whether continuing guarantee — Whether guarantor could raise defence of limitation — Whether just and equitable

C

Civil Procedure — Pleadings — Striking out — Whether scandalous — Meaning of scandalous — Whether frivolous or vexatious — Meaning of frivolous or vexatious

D

Contract — Guarantee — Continuing guarantee — Construction of clauses — Whether guarantor's liability continuing — Whether limitation set in

E

A bridging loan of RM5m was granted by the plaintiff to one Silver Joy Development Sdn Bhd. The defendant, together with two other individuals, were the guarantors to the said loan. The borrower company was wound up and the other two guarantors were adjudged bankrupt. A letter of demand was sent by the plaintiff to the defendant on 5 October 1996. However, the plaintiff filed the present suit only on 14 January 2003 against the defendant to recover the said loan. The defendant filed an application to strike out the plaintiff's claim, alleging that the claim by the plaintiff was time barred. The senior assistant registrar allowed the defendant's claim and the plaintiff appealed to the judge in chambers.

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Held, allowing the plaintiff's appeal with costs:

Under O 18 r 19(1)(b) and (d) of the Rules of the High Court 1980, the court may at any stage of the proceeding order to be struck out any writ and statement of claim on the ground that it is scandalous, frivolous or vexatious or that it is otherwise an abuse of the process of the court. However, upon the true construction of the clauses in the deed of guarantee and indemnity dated 19 July 1994, in particular cl 3.2, the plaintiff was entitled to claim against the defendant as a guarantor at any time and the liability was continuous and it had never been discharged. Thus, the defendant having bound himself not

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A to raise limitation as a defence to enforce the contract, ought not to be permitted to go back on his word as it would be quite unjust and inequitable to permit him to do so. In the circumstances, it was not a plain and obvious case for the court to exercise its judicial discretion under O 18 r 19(1)(b), (c) and (d) (see paras 28–32).

B **[Bahasa Malaysia summary]**

C Satu pinjaman pembiayaan bernilai RM5j telah diluluskan oleh plaintiff kepada Silver Joy Development Sdn Bhd. Defendan bersama dengan dua individu lain, adalah penjamin kepada pinjaman tersebut. Syarikat peminjam telah digulungkan dan kedua-dua penjamin tersebut telah diisytiharkan bankrap. Satu surat tuntutan dihantar oleh plaintiff kepada defendan pada 5 Oktober 1996. Namun begitu, plaintiff hanya memfailkan guaman ini pada 14 Januari 2003 terhadap defendan untuk mendapatkan balik pinjaman tersebut. Defendan memfailkan satu permohonan untuk membatalkan tuntutan plaintiff, dengan mendakwa bahawa tuntutan oleh plaintiff telah luput had masa. Penolong pendaftar kanan membenarkan tuntutan defendan dan plaintiff merayu kepada hakim dalam kamar.

E **Diputuskan**, membenarkan rayuan plaintiff dengan kos:

F Di bawah A 18 k 19(1)(b) dan (d) Kaedah-Kaedah Mahkamah Tinggi 1980, mahkamah boleh, pada mana-mana peringkat prosiding, memerintahkan pembatalan apa-apa writ dan pernyataan tuntutan atas alasan bahawa ia adalah bersifat skandal, remeh dan menyusahkan atau sebaliknya ia adalah penyalahgunaan proses mahkamah. Walau bagaimanapun, berdasarkan penafsiran sebenar klausa-klausa dalam surat ikatan jaminan dan tanggung rugi bertarikh 19 Julai 1994, khususnya kl 3.2, plaintiff berhak untuk

G menuntut terhadap defendan sebagai penjamin pada bila-bila masa dan liabiliti adalah berterusan dan ia tidak pernah dilepaskan. Oleh itu, defendan yang telah mengikat dirinya supaya tidak menimbulkan had masa sebagai pembelaan untuk menguatkuasakan kontrak tersebut, tidak harus dibenarkan memungkir kata-katanya kerana ia adalah agak tidak adil dan tidak saksama

H untuk membenarkannya melakukan sedemikian. Dalam keadaan sedemikian, ia bukan satu kes yang jelas dan nyata untuk mahkamah melaksanakan budi bicara kehakimannya di bawah A 18 k 19(1)(b), (c) dan (d) (lihat perenggan 28–32).]

I **Notes**

For cases on breach of contract, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 4648–4649.

For cases on continuing guarantee, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 3877–3884.

For cases on striking out writ and statement of claim, application for, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 5805–5810. A

Cases referred to

- Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36 (refd) B
- Boey Oi Leng t/a Indah Reka Construction & Trading v Trans Resources Corporation Sdn Bhd* [2002] 1 CLJ 405 (refd)
- Gabriel Peter & Partners (suing as a firm) v Wee Chong Jin* [1998] 1 SLR 374 (refd)
- Great Eastern Life Assurance Co Ltd, The v Indra Janardhana Menon* [2005] 4 CLJ 717 (refd) C
- Mok Hin Wah & Ors v United Malayan Banking Corp Bhd* [1987] 2 MLJ 610 (refd)
- Nasri v Mesah* [1971] 1 MLJ 32 (refd)
- Nik Che Kok @ Nik Soo Kok v Public Bank Bhd* [2001] 2 MLJ 328 (refd) D
- Sia Siew Hong & Ors v Lim Gim Chian & Anor* [1995] 3 MLJ 141 (refd)
- Sim Kie Chon v Superintendent of Pudu Prison & Ors* [1985] 2 MLJ 385 (refd)
- Technointan Holding Sdn Bhd v Tetuan Tan Kim Siong & TBH Hong Jet* [2007] 1 MLJ 163 (refd) E

Legislation referred to

- Limitation Act 1953 s 6(1)
- Rules of the High Court 1980 O 18 r 19(1)(b), (c), (d)
- Chuah Chong Ewe (Syarikat Ng & Anuar) for the plaintiff.* F
- BP Ang (BP Ang & Tan) for the defendant.*

Mohd Sofian JC:

[1] Enclosure 50 is an application made by the defendant pursuant to O 18 r 19(1)(b) or (c) of the Rules of the High Court Rules 1980 ('the RHC') whereby the defendant seeks to strike out the plaintiff's amended writ and statement of claim dated 29 February 2004 on the grounds that the pleadings are scandalous, frivolous, vexatious or it may prejudice, embarrass or delay the fair trial of the action; or it is otherwise an abuse of the process of the court. G

[2] The defendant's application is premised on the following grounds, namely: H

- (i) that the plaintiff's claim is scandalous, frivolous and vexatious; I
- (ii) it may prejudice, embarrass or delay the fair trial of the action;

- A (iii) that the plaintiff's claim is otherwise an abuse of the process of the court.

FACTUAL BACKGROUND

- B [3] In the amended statement of claim the plaintiff pleaded that:
- C (i) The plaintiff is a company incorporated in Malaysia with a registered address at 11th Floor, Wisma MBSB, No 48, Jalan Dungun, Damansara Heights, 50490 Kuala Lumpur.
- D (ii) The defendant was at all material time a guarantor with an address at No 1270 Berapit Village, Bukit Mertajam, Pulau Pinang or at No 6461, Jalan Ayam Didik 3, Kawasan Perindustrian Ringan, Taman Ria Jaya, 08000 Sungai Petani.
- E (iii) Letter dated 11 November 1998, ('the letter of offer') signed between the plaintiff and the the defendant, the plaintiff granted to Silver Joy Development Sdn Bhd a bridging loan of RM5m ('the said bridging loan') subject to the terms and conditions as contained in the letter of offer and the loan agreement.
- F (iv) Pursuant hereto, the defendant together with one Ang Chaing Boon and Mohamad Ronnie Koay bin Abdullah jointly and severally signed a deed of guarantee and indemnity dated 19 July 1994 in consideration of the plaintiff agreeing to grant the loan to Silver Joy Development Sdn Bhd subject to the terms and conditions therein contained ('the borrower').
- G (v) The borrower had failed to observe the terms conditions of the bridging loan agreement and as at 23 October 2002, had defaulted in its repayment in the sum of RM13,915,176.12.
- H (vi) The borrower had been wound up vide Winding Up Petition No 28-1 of 1998.
- I (vii) The plaintiff's solicitor's had on 23 October 2002 written to the defendant Ang Chaing Boon and Mohamad Ronnie Koay bin Abdullah for the payment of RM13,915,176.12.
- (viii) Ang Chaing Boon had been adjudged a bankrupt on 4 March 1998.
- (ix) Mohamad Ronnie Koay bin Abdullah had been adjudged a bankrupt on 23 June 1998.
- [4] The relief sought by the plaintiff in his statement of claim against the defendant jointly or separately:
- (a) the sum of RM13,915,176.12 as at 23 October 2002;

- (b) interest at the rate of 9.5% per annum from 24 October 2002 till full realisation; A
- (c) costs;
- (d) any other relief deemed fit by the honourable court. B
- [5] In the amended defence dated the 4 July 2005, the defendant avers, inter alia, as follows:
- (i) that the defendant denied having any knowledge of bridging loan agreement dated 19 July 1994 signed between the plaintiff and the borrower. Alternatively, if there were such an agreement, it was void and unenforceable because the purported attorney for the borrower had no authority to sign the said agreement; C
- (ii) that the release of the money by the plaintiff to the borrower was wrongful as it did not comply with the condition for its release; D
- (iii) that the plaintiff's claim is statute barred pursuant to the Limitation Act 1953.
- [6] The said application, encl 50 was fixed for hearing on 18 July 2006 and the learned senior assistant registrar after reading the affidavits and written submissions filed by both parties allowed the defendant's application to strike out the plaintiff's writ and statement of claim with costs. E
- [7] Hence, the plaintiff who was dissatisfied with the said decision filed this notice of appeal to judge in chambers on 12 July 2006. F
- [8] Both counsel for the plaintiff and the defendant informed the court that for the purposes of this appeal, they would adopt and rely on the written submissions (encls 55, 57 and 59 bundle of authorities) filed in respect of encl 50 before the learned senior assistant registrar. G
- [9] For this purpose, the defendant's counsel had filed the following documents: H
- (i) bundle of authority (encl 54);
- (ii) written submission (encl 55);
- (iii) additional bundle of authority (encl 58);
- (iv) written submission in reply (encl 59). I
- [10] The plaintiff's counsel had filed the following documents:
- (i) bundle of authority (encl 56);

- A (ii) written submission (encl 57).

THE DEFENDANT'S SUBMISSION

- B [11] The defendant described the relationship between the plaintiff, the borrower and the defendant as contractual. In accordance to s 6(1) of the Limitation Act 1953, action should not be brought after the expiration of six years from the date on which the cause of action accrued.

- C [12] Counsel for the defendant referred to cl 2 of the loan agreement and argued that the defendant's liability to pay accrued upon the expiry of the 14 day period as stipulated in the defendant's exh 'SAT-1'. Exhibit 'SAT 1' was the letter of demand dated 5 October 1996 sent to the defendant. According to the defendant, the cause of action ought to have been filed on or before 19 October 2002. In this case, the plaintiff had only filed the writ and statement of claim on 14 January 2003, and therefore it was statute barred. The defendant's counsel referred to the case of *Mok Hin Wah & Ors v United Malayan Banking Corp Bhd* [1987] 2 MLJ 610 where the Supreme Court at p 611 held as follows:

- E The reason is that in the letters of guarantee the provisions about demand are a real stipulation and not mere words. Under cl 1, the guarantors are to pay 'on demand ...'. Since bank guarantees invariably specify that the liability of the guarantor is to pay on demand, the words are not devoid of meaning or effect but make the demand a *condition precedent* to suing the guarantor ...

- F [13] The defendant's counsel further refer to the case of *Nik Che Kok @ Nik Soo Kok v Public Bank Bhd* [2001] 2 MLJ 328, where the Court of Appeal held as follows:

- G The liability of the principal debtor as well as that of the guarantors arose from the first notice of demand dated 2 April 1986. *There is no general rule that a notice of demand must specifically mention the precise amount owing.* A demand is for the purpose of bringing home to the debtor that the creditor is demanding its money. For the purpose of limitation, time began to run from the earliest time at which the creditor could have brought an action. In the present case the earliest time the respondent could have commenced a suit was on after issuing the notice of demand of 2 April 1986. Since the suit was filed more than six years after the cause of action accrued, the suit was statute barred by virtue of s 6(1)(a) of the Limitation Act 1953 (see p 331A–C).

- I [14] On the issue of continuing liabilities, the defendant's counsel submitted that, the defendant's liability arose after the expiry of the 14 days period as stipulated in the notice of demand. There was no agreement to extend the limitation period in reference to the payment of the outstanding

sum due and owing to the plaintiff. The cause of action accrued as soon as the 14 days period expired. The plaintiff should not interpret that the defendant's obligation to pay the plaintiff as a continuing liability because if it was so, the cause of action will never accrue and will defer to time which is uncertain. Reference was made to the case of *The Great Eastern Life Assurance Co Ltd v Indra Janardhana Menon* [2005] 4 CLJ 717 where at p 724 para C, the court held:

Section 6(1)(a) of the Act provides that 'action founded on a contract shall not be brought after the expiration of six years from the date on which the cause of action accrued'.

[15] The law on when a cause of action accrues is already well settled and very much entrenched in our jurisprudence which is this. A cause of action founded on contract accrues on the date of its breach and that the time begins to run from that breach.

SUBMISSIONS BY THE PLAINTIFF

[16] Counsel for the plaintiff submitted that in accordance to the terms and conditions of the deed of guarantee and indemnity dated 19 July 1994 the liability of the defendant was a continuing liability. With the signing of the deed of guarantee and indemnity, the defendant was bound by its terms and conditions whereby the plaintiff could take action against the defendant at any time. The plaintiff's counsel referred to the relevant clauses in the deed of guarantee and indemnity, namely:

Clause 3 Guarantor's Covenants:

3.2 that the *liability of the Guarantors* under the guarantee and indemnity herein *shall subsist* whether or not Malaysian Building Society Berhad (hereinafter known as 'MBSB') has a legal right to claim against the Borrower or any other surety or against any security which *MBSB may now or at any time* hereafter or *from time to time have from or against the Borrower or any other person for any sums, loss or damage or whether or not MBSB has availed itself of its legal remedies against the Borrower or any other surety* or against any security as aforesaid;

3.8 that the guarantee and indemnity shall not be considered as satisfied by any intermediate payment or satisfaction of the whole or any part of any sum or sums of money owing as aforesaid but shall be *continuing security* and shall extend to cover any sum or sums of moneys which shall for the time being constitute the balance due from the Borrower to MBSB upon any such account or accounts as herein mentioned;

3.9 that the guarantee and indemnity of the Guarantors herein shall be a *continuing guarantee* and security for all monies whatsoever now or hereafter from time to time owing to MBSB by the Borrower whether alone or jointly and severally with another or others and whether as principle or surety notwithstanding

- A that the Borrower may at any time or times cease to be indebted to MBSB for any period or periods and notwithstanding any settlement of account or accounts or otherwise;
- B 3.11 that all sums of *monies not recovered or recoverable from the Guarantors* or any of them on the basis of a guarantee *whether by reason of any legal limitation, disability or incapacity on or of the Borrower or any other fact and circumstances and, whether known or not to MBSB shall nevertheless be recoverable from the Guarantors* or any of them as principle debtors in respect hereof and shall be repaid by the Guarantors and each of them upon demand made by MBSB or on MBSB's behalf;
- C 3.21 that *MBSB shall be entitled to recover from the Guarantors* or any of them, all sums payable by the Guarantors hereunder without first availing itself or themselves of its or their legal remedies against the Borrower or any other surety or against any security MBSB *may now or at any time* hereafter or from time to time have from or against the Borrower or any other persons; and
- D Indemnity Clause.
- E 6. As a separate, additional and continuing obligation, the Guarantors in conditionally and irrevocably undertake with MBSB that, should the indebtedness amounts not be recoverable from the Guarantors under Clause 2 for any reason whatsoever (including, but without prejudice to the generality of the foregoing by reason of any provision of the Loan Agreement being or becoming void, unenforceable or otherwise invalid under any applicable law) then, notwithstanding that may have been known to MBSB, each of the guarantors will, as a sole, original and independent obligor, upon first written demand by MBSB under Clause 2, make payment of the indebtedness by way of full indemnity in
- F such manner as is provided for in the Loan Agreement.
- G [17] Counsel for the plaintiff further submitted that based on the case of *Sia Siew Hong & Ors v Lim Gim Chian & Anor* [1995] 3 MLJ 141 the court held at pp 151–152 as follows:
- H As a general rule, in action for breach of contract, time under the Limitation Act 1953 beings to run from the date of its breach. *Nasri v Mesah* [1971] 1 MLJ 32 is authority for that proposition ...
- I ... that the cause of action arises at the time when the debt could first have been recovered by action. The right to bring an action may arise that the statute runs from the earliest time at which an action could be brought.
- [18] But it must always be borne in mind that the question as to when a cause of action arises in relation to the breach of a contract is one that depends for its determination upon the construction of a particular contract. Thus, it may be inappropriate to apply the general rule laid down in *Nasri v Mesah* where the breach complained is a continuing one or where the complaint relates to the breach of certain contracts of indemnity.

[19] The court in *Sia Siew Hong's* case construed the document when read as a whole as an indemnity rather than a guarantee. It was described a guarantee in the final clause whereby the appellants agreed that the respondents may enforce the 'guarantee' at any time.

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[20] The plaintiff further submitted that the principle is that the general rule governing the limitation for breach of contract may be displaced by a contrary intention evinced by the parties in a particular case.

B

[21] Counsel for the plaintiff also submitted that in the case before the court, there is a similar clause as found in the case of *Sia Siew Hong* that is in cl 3.2.

C

[22] In *Sia Siew Hong's* case at p 155, Gopal Sri Ram JCA described the final clause in the document whereby the appellant agreed that the respondent may enforce the 'guarantee' at any time. His Lordship further described the said clause as follows:

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That appears to me to be a promise for value by which the appellants bound themselves not to raise limitation as a defence to an action brought to enforce the contract. In such circumstances, it seems quite plain that the appellants might not to be permitted to go back on their word. It would be quite unjust and inequitable to permit them to do so.

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[23] On the issue of whether the plaintiff's writ and statement of claim ought to be struck out, the plaintiff's counsel submitted that the case before the court was not a case where on the facts is not a case of plain and obvious where the court ought to exercise its discretion to strike out the writ and statement of claim.

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PRINCIPLES FOR STRIKING OUT

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[24] In order for the defendant to succeed for an order under O 18 r 19(1) of the RHC, he must satisfy the court that the plaintiff's claim is plainly and obviously hopeless and scandalous, frivolous or vexatious where the defences are unarguable.

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[25] The Federal Court in *Sim Kie Chon v Superintendent of Pudu Prison & Ors* [1985] 2 MLJ 385 at p 386 held:

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The principle governing the striking out of pleadings is clear in that it is only in plain and obvious cases that recourse should be had to the summary process under O 18 r 19 of the Rules of the High Court 1980; the summary procedure under this rule can only be adopted when it can clearly be seen that a claim or answer is on the face of it 'obviously unsustainable'.

- A [26] This view was adopted by the Supreme Court in the case of *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36 (at p 43):

- B The principle upon which the courts act in exercising its power under any of the four limbs of O 18 r 19(1) of the RHC are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule and this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it 'obviously unsustainable'.

- C ORDER 18 RULE 19(1)(B) AND (D)

- D [27] Under O 18 r 19(1)(b) and (d) of the RHC, the court may at any stage of the proceeding order to be struck out any writ and statement of claim in the action on the ground that: (b) it is scandalous, frivolous or vexatious; or (d) it is otherwise an abuse of the process of the court.

- E [28] From the plethora of authorities pertaining to the question of what amounts to 'scandalous' it is taken to mean 'wholly unnecessary and irrelevant' and not merely unpleasant allegations. The cases which discussed the meaning of 'scandalous' are *Technointan Holding Sdn Bhd v Tetuan Tan Kim Siong & TBH Hong Jet* [2007] 1 MLJ 163 and *Boey Oi Leng t/a Indah Reka Construction & Trading v Trans Resources Corporation Sdn Bhd* [2002] 1 CLJ 405.

- F [29] The words 'frivolous or vexatious' on the other hand, mean 'obviously unsustainable' (see *Technointan Holding Sdn Bhd v Tetuan Tan Kim Siong & TBH Hong Jet*).

- G [30] As to the meaning of 'an abuse of the process of the court' reference is made to the case of *Gabriel Peter & Partners (suing as a firm) v Wee Chong Jin* [1998] 1 SLR 374 at p 384:

- H The term 'abuse of the process of the court', in O 18 r 19(1)(d), has been given a wide interpretation by the courts. It includes considerations of public policy and the interests of justice. This term signifies that the process of the court must be used bona fide and properly and must not be abused. The court will prevent the improper use of its machinery. It will prevent the judicial process from being used as a means of vexation and oppression in the process of litigation. The categories of conduct rendering a claim frivolous, vexatious or an abuse of process are not closed and will depend on all relevant circumstances of the case. A type of conduct which has been judicially acknowledged as an abuse of process is the bringing of an action for a collateral purpose ... if an action was not brought bona fide for the purpose of obtaining relief but for some other ulterior or collateral purpose, it might be struck out as an abuse of the process of the court.
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DECISION OF THE COURT

[31] On the above consideration, the court is satisfied that upon the true construction of the clauses in the deed of guarantee and indemnity dated 19 July 1994 in particular cl 3.2, the plaintiff was entitled to claim against the defendant as a guarantor at any time and the liability is continuing and it has never been discharged. The court is also of the view that the defendant has bound himself not to raise limitation as a defence to an action to enforce the contract. The defendant ought not to be permitted to go back on his word. It would be quite unjust and inequitable to permit him to do so (see the case of *Sia Siew Hong & Ors v Lim Gim Chian & Anor*).

[32] The court is unable to find any merits in the application by the defendant in encl 50 to strike out the plaintiff's claim. On the facts, it is not a 'plain and obvious' case for the court to exercise its judicial discretion under O 18 r 19(1)(b), (c) and (d). I therefore, allowed the plaintiff's appeal (encl 59) with costs.

Plaintiff's appeal allowed with costs.

Reported by Brendan Navin Siva

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